

U.S. FISH CORP.
v.
EASTERN AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 91-39-A

Decided June 25, 1991

Appeal from the cancellation of an aquaculture lease.

Affirmed.

1. Indians: Leases and Permits: Cancellation or Revocation

A lease of trust or restricted Indian property is subject to cancellation when the lessee admits that a breach of the lease was not cured after the lessee was informed of the breach and was given an opportunity to cure it.

2. Board of Indian Appeals: Jurisdiction

The Board of Indian Appeals is not a court of general jurisdiction and has only those powers delegated to it by the Secretary of the Interior. It has not been delegated authority to award money damages against the Bureau of Indian Affairs or an Indian tribe.

APPEARANCES: Leon Braun, President, U.S. Fish Corporation, pro se; John H. Harrington, Esq., Office of the Solicitor, Southeast Region, U.S. Department of the Interior, Atlanta, Georgia, for the Area Director; George Johnson, Director of Real Estate Services, Seminole Tribe of Florida, Hollywood, Florida, and Martin E. Seneca, Jr., Esq., Reston, Virginia, for the Seminole Tribe of Florida, Inc.

OPINION BY CHIEF ADMINISTRATIVE JUDGE LYNN

Appellant U.S. Fish Corporation seeks review of a December 14, 1990, decision of the Eastern Area Director, Bureau of Indian Affairs (BIA; Area Director), cancelling Lease No. 187 (lease), between appellant and the Seminole Tribe of Florida, Inc. (tribal corporation). For the reasons discussed below, the Board of Indian Appeals (Board) affirms that decision.

Background

The tribal corporation is a Federally chartered corporation of the Seminole Tribe of Florida (Tribe), as defined in section 17 of the Indian Reorganization Act of 1934, as amended, 25 U.S.C. § 477 (1988). On December 31, 1986, appellant and the tribal corporation entered into the lease at issue. The lease was approved by the Area Director on February 2, 1987. Under the lease, the tribal corporation leased to appellant the Seminole catfish farm, the Seminole catfish processing plant, all buildings and improvements owned by the tribal corporation located on those premises together with enumerated personal property, the nonexclusive use of certain easements and rights of way available to the tribal corporation for ingress to and egress from the leased premises, and the trade name "Seminole Brand Catfish." The purpose of the lease was for appellant to conduct aquaculture activities on the leased premises. The lease and Exhibit E to the lease provide that the lease has a term of 10 years, beginning on April 1, 1987, and ending on April 1, 1997. Appellant was required to make quarterly lease rental payments on the first day of each quarter. The initial annual rental was \$60,000, with periodic adjustments.

By late 1988, appellant's owners had failed to make rental payments and were facing bankruptcy. A reorganization resulted in transfer of ownership of appellant to the present owners.

By letter dated October 9, 1990, the Director of Real Estate Services for the Tribe informed appellant:

Rent in the amount \$16,390.91 was due and payable on October 1, 1990.
Interest at 15% per annum now accrues until paid.

In accordance with Article #26 of Lease No. 187, this is your notice that you have thirty (30) days or until November 9, 1990, to pay the overdue rent plus interest. Your failure to comply shall result in the cancellation of Lease No. 187 and the removal of all persons and personal property from the premises. [Emphasis in original.]

There is no evidence that appellant responded to this letter.

By letter dated November 8, 1990, the Superintendent, Seminole Agency, BIA, informed appellant: "At the request of the Seminole Tribe of Florida, Inc., Lease No. 187 is herewith cancelled due to your failure to pay rent of \$16,390.91 plus interest of 15% per annum, which rent was due and payable on October 1, 1990. You were given notice of this default on October 9, 1990. Appellant was informed of its right to seek review of this decision by the Area Director.

Appellant filed an appeal dated November 20, 1990, in which it neither confirmed nor denied the statement that it had failed to pay rent. Instead,

appellant argued that it, not the tribal corporation, was the injured party, because the tribal corporation had failed to disclose pre-existing defects in the ponds, processing plant refrigeration, and farm well water. Appellant stated that it had been injured in the amount of \$2,776,800. ^{1/}

By letter dated December 14, 1990, the Area Director affirmed the Superintendent's decision to cancel the lease. The Area Director stated:

We have * * * considered the general overview of the defects you described. We have searched for relevant factors which would argue that the Superintendent's decision to cancel the lease was an improper exercise of his discretionary authority. We find no argument supporting improper action by the Superintendent against the [appellant] for cancelling the lease.

The Bureau has the authority to take action under the circumstances and fulfill its fiduciary obligation to protect the Tribe and the land from continued damage.

The Board received appellant's notice of appeal from this decision on January 11, 1991. Briefs were filed by appellant, the Area Director, and the tribal corporation. The tribal corporation requested that the Board require appellant to post an appeal bond. The Board denied the motion, but granted expedited consideration of the appeal.

Discussion and Conclusions

On appeal, appellant again does not deny that the rental payment was not made. Instead, appellant argues that the tribal corporation and BIA are guilty of misrepresentation because they failed to disclose defects in the leased property that were known to exist by both BIA and the tribal corporation, and that the tribal corporation was unresponsive to requests for amendment of the lease. Appellant contends that its attempts to correct the defects were costly and resulted in its going broke and being unable to make the lease payment. Appellant seeks reimbursement for the damages it states it has incurred in attempting to operate the leased

^{1/} By letter dated Dec. 12, 1990, the Tribe gave appellant notice of an additional breach of the lease. The letter stated that the tribal corporation had been informed that the Glades Electric Cooperative, Inc., had disconnected electric service to the leased premises because of appellant's failure to pay \$7,533.79 in service charges. Appellant was informed that this constituted a violation of Articles 9B, 34, and 7A of the lease. Appellant was given 60 days to correct this violation and was informed that failure to do so might result in termination of the lease. Although the lack of electric service was cited by the tribal corporation as a reason to require that appellant file an appeal bond in this case, the Board is not aware of whether any further action has been taken because of this alleged breach.

property, and reinstatement of the lease with modifications designed to adjust for the defects appellant has identified. 2/

The Area Director argues that the Board lacks jurisdiction over most of this appeal. He acknowledges that the Board has jurisdiction to review his decision to cancel the lease, but contends that the Board does not have jurisdiction to award money damages to appellant against either the tribal corporation or BIA, and does not have authority to grant a lease of Indian property or require the lease modifications appellant requests.

[1] BIA notified appellant that it had breached the lease by failing to make the rental payment and gave appellant an opportunity to cure the breach. Appellant has admitted that the rental payment was not made. Under these circumstances, the lease is subject to cancellation.

Appellant, however, argues, in essence, that its breach of the lease should be excused because of the misrepresentations of BIA and the tribal corporation as to the condition of the property. Appellant's argument is based upon its allegations that the defects pre-existed the execution of the lease, were known to both BIA and the tribal corporation when the lease was executed, and could not have been detected by appellant through the exercise of reasonable diligence in inspecting the property prior to the execution of the lease. 3/

Section 12 of the lease provides: "This Lease is made by Lessor and accepted by Lessee subject to the existing condition and state of repair of the leased property and adjoining areas and facilities." Although appellant alleges that this section is ambiguous, it does not attempt to demonstrate how it is ambiguous. The Board finds no ambiguity in the lease provision. The inclusion of such a statement in a lease should put a reasonable investor or potential lessee on notice that problems may exist with the leased property. Furthermore, appellant does not contend that the Tribe's prior failure to operate the fish farm at a profit was concealed from it.

Neither the lease nor the regulations in 25 CFR Part 162 expressly provide for excuse of breaches of a lease. 4/ With the lessor's agreement,

2/ At page 2 of its response to the Board's Mar. 22, 1991, order to show cause why it should not be required to file an appeal bond, appellant states that it has "shown in its Statement of Reasons that the Seminoles misrepresented the lease and were not entitled to the rent they have received." (Emphasis in original.) At page 3 of the same filing, appellant further states: "Until The Seminole Corporation can prove the defects didn't exist when the lease was signed, they have already received too much rent for defective properties and are not entitled to more until the lease with the defect situation is resolved."

3/ In fact, appellant contends that the defects were not obvious even to experts in aquaculture, who were called in at various times for advice and/or assistance.

4/ Section 20(D) of the lease states: "It is understood and agreed that violations of this Lease shall be acted upon in accordance with the regulations in 25 CFR now or hereafter in force." 25 CFR 162.14 provides

it is at least arguable that a breach of a lease could be excused. See 25 CFR 162.14. Cf. Star Lake Railroad Co. v. Navajo Area Director, 15 IBIA 220, 244, 94 I.D. 353, 365, recon. denied, 15 IBIA 271 (1987) ; aff'd sub nom. Star Lake Railroad Co. v. Lujan, 737 F. Supp. 103 (D. D.C. 1990); aff'd, 925 F.2d 490 (D.C.Cir. 1991) (The regulation at issue in Star Lake, 25 CFR 169.20, allowed the exercise of discretion in a determination of whether or not a right-of-way should be terminated for violation of the terms of the right-of-way). Under the circumstances of this case, appellant should have been on notice that defects might exist in the property and should have made further inquiry. Even assuming that each and every defect appellant cites existed before lease execution, the Board has no basis for holding that those defects excuse appellant's breach.

[2] The major part of appellant's filings are devoted to its arguments that it is the injured party and is entitled to damages against BIA and/or the tribal corporation. The Board is not a court of general jurisdiction. It has only that authority delegated to it by the Secretary of the Interior. It has not been delegated authority to award money damages against BIA or an Indian tribe. Dawn Mining Co. v. Portland Area Director, 20 IBIA 50 (1991); Price v. Portland Area Director, 18 IBIA 272 (1990), and cases cited therein. The Board cases appellant cites do not hold otherwise or give the Board authority beyond that delegated to it by the Secretary.

In addition, the granting of leases of trust or restricted property is a matter entrusted to the discretion of BIA. The Board has not been delegated authority to grant a lease of such property or to require modification of a lease under the circumstances present here. See, e.g., Smith v. Acting Billings Area Director, 17 IBIA 231 (1989).

Accordingly, appellant has now exhausted its administrative remedies. If appellant wishes to contest this matter further, it should proceed to the appropriate judicial forum.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the December 14, 1990, decision of the Eastern Area Director is affirmed.

Kathryn A. Lynn
Chief Administrative Judge

I concur:

Anita Vogt
Administrative Judge

fn. 4 (continued)

procedures to be followed when there are violations of a lease of trust or restricted property.